

	)	
<b>T.J., Appellant</b>	)	
	)	
<b>and</b>	)	<b>Docket No. 19-1656</b>
	)	<b>Issued: September 18, 2020</b>
<b>U.S. POSTAL SERVICE, MAIN POST OFFICE,</b>	)	
<b>San Bernardino, CA, Employer</b>	)	
	)	

### Case Submitted on the Record

Before:  
ALEC J. KOROMILAS, Chief Judge  
JANICE B. ASKIN, Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge

On July 31, 2019 appellant filed a timely appeal from a July 10, 2019 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.<sup>2</sup>

<sup>2</sup> The Board notes that following the July 10, 2019 decision, OWCP received additional evidence. However, the Board’s *Rules of Procedure* provides: “The Board’s review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal.” 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

## **ISSUE**

The issue is whether appellant has met her burden of proof to establish more than 10 percent impairment of the left upper extremity and more than 10 percent permanent impairment of each lower extremity for which she has previously received schedule award compensation.

## **FACTUAL HISTORY**

On March 29, 2004 appellant, then a 45-year-old city carrier, filed an occupational disease claim (Form CA-2), alleging that she experienced pain to her buttocks, legs, neck, shoulders, feet, and ankles due to factors of her federal employment, including increased walking from 7 to 10 miles, carrying a heavy satchel, and casing mail. The claim was adjudicated by OWCP under File No. xxxxxx877. Following an initial denial on June 23, 2004, on August 4, 2005 it accepted the claim for sprain of the back, lumbar region, and sprain of the neck.

On May 18, 2005 appellant filed a Form CA-2 claim, alleging that due to carrying mail and walking she developed bilateral foot, lower extremity, low back, neck, left shoulder, and bilateral hip conditions. OWCP adjudicated this claim under File No. xxxxxx738 and accepted it for lumbar and cervical sprains, left lateral epicondylitis, and other affectations of the left shoulder.<sup>3</sup>

OWCP administratively combined File Nos. xxxxxx877 and xxxxxx738, with File No. xxxxxx877 designated as the master file.

Under File No. xxxxxx877, OWCP paid appellant intermittent compensation on the supplemental rolls from May 23 through August 29, 2005. On August 26, 2007 OWCP began paying appellant loss of wage-earning capacity (LWEC) compensation on the periodic rolls for four hours daily.<sup>4</sup>

On July 2, 2015 appellant filed a claim for a schedule award (Form CA-7). She submitted a January 23, 2015 report in which Dr. Khalid B. Ahmed, a Board-certified orthopedic surgeon, opined that appellant had reached maximum medical improvement (MMI) on May 1, 2013. He provided an impairment rating in accordance with the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).<sup>5</sup> Dr. Ahmed opined that, utilizing Chapter 17, The Spine and Pelvis, appellant had 6 percent whole person impairment based on intervertebral disc herniation and radiculopathy of the cervical spine and 12 percent whole person impairment for the lumbar spine. For her left shoulder, he opined that under

---

<sup>3</sup> OWCP referenced another claim adjudicated under File No. xxxxxx180, accepted for bilateral plantar fibromatosis. It also indicated that appellant was granted schedule awards for the bilateral lower extremities under that claim, *i.e.*, four percent impairment for each foot. However, the Board does not have access to this case file through the Integrated Federal Employees' Compensation System (iFECS), its electronic file.

<sup>4</sup> OWCP based the LWEC determination on the April 26, 2007 second opinion evaluation of Dr. Bunsri Sophon, a Board-certified orthopedic surgeon, who advised that appellant could work four hours daily.

<sup>5</sup> A.M.A., *Guides* (6<sup>th</sup> ed. 2009).

Table 15-5, Shoulder Regional Grid, she had two percent left upper extremity impairment or one percent whole person impairment.<sup>6</sup>

On September 24, 2015 Dr. Leonard A. Simpson, an orthopedic surgeon serving as an OWCP district medical adviser (DMA), reviewed Dr. Ahmed's reports dated May 1, 2013 and January 23, 2015 and the medical evidence of record.<sup>7</sup> He found that Dr. Ahmed's impairment evaluation could not be considered probative for schedule award purposes under FECA, because he utilized whole person impairments for the scheduled members, and FECA does not recognize whole person impairment. The DMA applied the A.M.A., *Guides* and *The Guides Newsletter*, *Rating Spinal Nerve Extremity Impairment Using the Sixth Edition* (July/August 2009) (*The Guides Newsletter*), utilizing Dr. Ahmed's May 1, 2013 findings. Using the range of motion (ROM) methodology for impairment, Dr. Simpson opined that appellant had 10 percent permanent impairment of the left upper extremity. Using *The Guides Newsletter* for her back condition, he found, 6 percent permanent impairment for sensory and motor deficits at L4 and L5 bilaterally, and 4 percent permanent impairment for S1 sensory and motor deficits bilaterally for a total 16 percent permanent impairment of each lower extremity. The DMA noted that appellant had previously received a schedule award for four percent impairment of each foot under OWCP File No. xxxxxx180, which equaled three percent impairment of each leg. He concluded that appellant had 13 percent permanent impairment of each lower extremity.

By decision dated September 21, 2016, OWCP granted appellant a schedule award for 10 percent permanent impairment of the left upper extremity and 10 percent permanent impairment of the left lower extremity and 10 percent permanent impairment of the right lower extremity. The period of the award was from September 18, 2016 to June 1, 2018.<sup>8</sup> OWCP had paid appellant LWEC compensation continuously through September 17, 2016 and began paying schedule award compensation effective September 18, 2016. It did not resume LWEC compensation when her schedule award compensation ended on June 1, 2018.

On February 25, 2019 appellant filed a Form CA-7 for an additional schedule award.<sup>9</sup> Appellant submitted a February 8, 2019 progress report from Dr. Ahmed. With regard to the cervical spine and upper extremities, Dr. Ahmed described physical examination findings of limited range of motion of the cervical spine, paraspinal tenderness and spasm, restricted and

---

<sup>6</sup> Dr. Ahmed had previously submitted an impairment evaluation on October 18, 2013 that referenced his May 1, 2013 examination. Utilizing the fifth edition of the A.M.A., *Guides* (5<sup>th</sup> ed. 2001), he advised that appellant had 7 percent whole person impairment of the cervical spine, 3 percent whole person impairment of the left upper extremity, 13 percent whole person impairment of the lumbar spine, and 4 percent whole person impairment of the right knee for a combined whole person impairment of 25 percent.

<sup>7</sup> In a referral memorandum, OWCP noted that appellant had two additional accepted claims and referenced both File No. xxxxxx738, and File No. xxxxxx180, accepted for plantar fibromatosis for which appellant had received a schedule award for four percent permanent impairment of each foot. See *supra* note 3. The latter claim is not before the Board in appellant's current appeal.

<sup>8</sup> The September 21, 2016 schedule award decision found in OWCP File No. xxxxxx877 and OWCP File No. xxxxxx738 contains only the first page and does not explain OWCP's schedule award calculations.

<sup>9</sup> On August 19, 2005 appellant filed a claim for compensation for the period March 18 to May 22, 2005. By decision dated February 13, 2018, OWCP denied appellant's claim for compensation. Following reconsideration requests, by decisions dated April 2, 2018 and May 14, 2019 OWCP denied merit review. Appellant did not file an appeal with the Board from the May 14, 2019 decision.

painful range of motion of the right shoulder, tenderness over greater tuberosity of humerus, and a positive impingement test. With regard to the lumbar spine, he noted limited range of motion, positive straight leg test bilaterally, paraspinal tenderness and spasms. Dr. Ahmed also noted limited range of motion of the bilateral wrists and hands, tenderness over the distal radioulnar joint, and positive Phalen's signs over the carpal tunnel bilaterally. He described his review of his previous medical records and advised that appellant was permanent and stationary on May 1, 2013. Dr. Ahmed diagnosed cervical strain/sprain with multiple level herniated discs with radiculopathy; lumbar spine strain/sprain with herniated discs at L3-4, L4-5, and L5-S1; left shoulder strain/sprain with impingement syndrome; left elbow strain/sprain; bilateral wrist and hand strain/sprain, rule out carpal tunnel syndrome; overload pain of the right shoulder, rule out tendinitis, impingement; rotator cuff tear; and symptoms of anxiety and depression.

In a development letter dated March 14, 2019, OWCP requested that appellant submit an impairment evaluation from her attending physician in accordance with the A.M.A., *Guides* that included a discussion of the rationale for calculation with references to tables in the A.M.A., *Guides*. It further noted that, if her physician was unable or unwilling to provide the required report, it would refer her to a second opinion physician. OWCP afforded appellant 30 days to submit the requested evidence.

Dr. Ahmed thereafter submitted additional treatment notes dated March 15, April 26, and June 7, 2019. He repeated appellant's complaints and described physical examination findings, and reiterated his diagnoses. Dr. Ahmed again noted that appellant was permanent and stationary.

By decision dated July 10, 2019, OWCP denied appellant's claim for an additional schedule award. It indicated that she had not submitted additional evidence in response to its March 14, 2019 development letter and found that she failed to submit medical evidence supporting an increase in the impairment already compensated.

### **LEGAL PRECEDENT**

The schedule award provisions of FECA,<sup>10</sup> and its implementing federal regulations,<sup>11</sup> set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss, or loss of use, of scheduled members or functions of the body. However, FECA does not specify the manner in which the percentage loss of a member shall be determined. The method used in making such a determination is a matter which rests in the discretion of OWCP. For consistent results and to ensure equal justice, the Board has authorized the use of a single set of tables so that there may be uniform standards applicable to all claimants. OWCP evaluates the degree of permanent impairment according to the standards set forth in the specified edition of the A.M.A., *Guides*, published in 2009.<sup>12</sup> The Board has approved the use by OWCP

---

<sup>10</sup> *Supra* note 1.

<sup>11</sup> 20 C.F.R. § 10.404.

<sup>12</sup> For decisions issued after May 1, 2009 the sixth edition of the A.M.A., *Guides* is used. A.M.A., *Guides* (6<sup>th</sup> ed. 2009); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Award and Permanent Disability Claims*, Chapter 2.808.5(a) (March 2017); *see also* Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010).

of the A.M.A., *Guides* for the purpose of determining the percentage loss of use of a member of the body for schedule award purposes.<sup>13</sup>

It is the claimant's burden of proof to establish permanent impairment of a scheduled member or function of the body as a result of an employment injury.<sup>14</sup> OWCP's procedures provide that, to support a schedule award, the file must contain competent medical evidence which shows that the impairment has reached a permanent and fixed state and indicates the date on which this occurred, describes the impairment in sufficient detail so that it can be visualized on review, and computes the percentage of impairment in accordance with the A.M.A., *Guides*.<sup>15</sup>

Neither FECA nor its implementing regulations provide for a schedule award for impairment to the back or to the body as a whole.<sup>16</sup> Furthermore, the back is specifically excluded from the definition of organ under FECA.<sup>17</sup> The sixth edition of the A.M.A., *Guides* does not provide a separate mechanism for rating spinal nerve injuries as impairments of the extremities. Recognizing that FECA allows ratings for extremities and precludes ratings for the spine, *The Guides Newsletter* offers an approach to rating spinal nerve impairments consistent with sixth edition methodology. For peripheral nerve impairments to the upper or lower extremities resulting from spinal injuries, OWCP's procedures indicate that *The Guides Newsletter* is to be applied.<sup>18</sup> The Board has recognized the adoption of this methodology for rating extremity impairment, including the use of *The Guides Newsletter*, as proper in order to provide a uniform standard applicable to each claimant for a schedule award for extremity impairment originating in the spine.<sup>19</sup>

In addressing upper extremity impairments, the sixth edition requires identification of the impairment class of diagnosis (CDX) condition, which is then adjusted by grade modifiers based on functional history (GMFH), physical examination (GMPE), and clinical studies (GMCS).<sup>20</sup> The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).<sup>21</sup>

---

<sup>13</sup> See *K.J.*, Docket No. 19-1492 (issued February 26, 2020); *P.R.*, Docket No. 19-0022 (issued April 9, 2018); *Isidoro Rivera*, 12 ECAB 348 (1961).

<sup>14</sup> See *T.H.*, Docket No. 19-1066 (issued January 29, 2020); *D.F.*, Docket No. 18-1337 (issued February 11, 2019); *Tammy L. Meehan*, 53 ECAB 229 (2001).

<sup>15</sup> See 5 U.S.C. § 8101(19); *J.K.*, Docket Nos. 19-1420 & 19-1422 (issued August 12, 2020); *Francesco C. Veneziani*, 48 ECAB 572 (1997).

<sup>16</sup> 5 U.S.C. § 8107(c); 20 C.F.R. § 10.404(a) and (b); see *D.D.*, Docket No. 19-1676 (issued July 29, 2020); *B.W.*, Docket No. 18-1415 (issued March 8, 2019); *J.M.*, Docket No. 18-0856 (issued November 27, 2018); *N.D.*, 59 ECAB 344 (2008); *Tania R. Keka*, 55 ECAB 354 (2004).

<sup>17</sup> *J.K.*, *supra* note 15.

<sup>18</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 3.700 (January 2010). *The Guides Newsletter* is included as Exhibit 4.

<sup>19</sup> *D.D.*, *supra* note 16; *E.D.*, Docket No. 13-2024 (issued April 24, 2014); *D.S.*, Docket No. 13-2011 (issued February 18, 2014).

<sup>20</sup> A.M.A., *Guides* 383-492.

<sup>21</sup> *Id.* at 411.

The A.M.A., *Guides* also provide that the ROM impairment methodology is to be used as a stand-alone rating for upper extremity impairments when other grids direct its use or when no other diagnosis-based impairment (DBI) sections are applicable.<sup>22</sup> If ROM is used as a stand-alone approach, the total of motion impairment for all units of function must be calculated. All values for the joint are measured and added.<sup>23</sup> Adjustments for functional history may be made if the evaluator determines that the resulting impairment does not adequately reflect functional loss and functional reports are determined to be reliable.<sup>24</sup>

OWCP issued FECA Bulletin No. 17-06 to explain the use of the DBI methodology versus the ROM methodology for rating of upper extremity impairments.<sup>25</sup> Regarding the application of ROM or DBI impairment methodologies in rating permanent impairment of the upper extremities, FECA Bulletin No. 17-06 provides in pertinent part:

“Upon initial review of a referral for upper extremity impairment evaluation, the DMA should identify (1) the methodology used by the rating physician (*i.e.*, DBI or ROM) and (2) whether the applicable tables in Chapter 15 of the [A.M.A.,] *Guides* identify a diagnosis that can alternatively be rated by ROM. *If the [A.M.A.,] Guides allow for the use of both the DBI and ROM methods to calculate an impairment rating for the diagnosis in question, the method producing the higher rating should be used.*” (Emphasis in the original.)<sup>26</sup>

The Bulletin further advises:

“If the rating physician provided an assessment using the ROM method and the [A.M.A.,] *Guides* allow for use of ROM for the diagnosis in question, the DMA should independently calculate impairment using both the ROM and DBI methods and identify the higher rating for the CE.”<sup>27</sup>

OWCP’s procedures provide that, after obtaining all necessary medical evidence, the file should be routed to a DMA for an opinion concerning the nature and percentage of impairment in accordance with the A.M.A., *Guides*, with the DMA providing rationale for the percentage of impairment specified.<sup>28</sup>

---

<sup>22</sup> *Id.* at 461.

<sup>23</sup> *Id.* at 473.

<sup>24</sup> *Id.* at 474.

<sup>25</sup> FECA Bulletin No. 17-06 (May 8, 2017).

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*; *see also* H.H., Docket No. 19-1530 (issued June 26, 2020); A.G., Docket No. 18-0329 (issued July 26, 2018).

<sup>28</sup> Federal (FECA) Procedure Manual, *supra* note 18 at Chapter 2.808.6(f); P.W., Docket No. 19-1493 (issued August 12, 2020).

## ANALYSIS

The Board finds that this case is not in posture for decision.

The Board initially notes that OWCP did not review the medical evidence found in File No. xxxxxx738 before it rendered its July 10, 2019 decision. Furthermore, Chapter 2.808.6d of OWCP's procedures provides that if there is indication in the record of impairment, OWCP should refer the case to its DMA before denying a schedule award claim.<sup>29</sup> Dr. Ahmed submitted progress notes dated February 8, March 15, April 26, and June 7, 2019. Thus, OWCP should have referred the case file to its DMA for review prior to issuing the July 10, 2019 decision denying her claim for a schedule award.

The Board notes that, although the appeal rights accompanying the July 10, 2019 decision clearly stated that a claimant could request only one type of appeal at that time, appellant simultaneously filed an appeal with the Board, requested a hearing with OWCP's Branch of Hearings and Review, and requested reconsideration with OWCP. During the pendency of this appeal, on October 7, 2019, an OWCP hearing representative issued a decision setting aside the July 10, 2019 decision and remanding the case for further medical development with regard to appellant's schedule award claim. OWCP decisions that change the status of a decision on appeal are null and void.<sup>30</sup> The October 7, 2019 decision is therefore null and void.

Nonetheless, it is well established that proceedings under FECA are not adversarial in nature and OWCP is not a disinterested arbiter. While the claimant has the burden of proof to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence and to see that justice is done.<sup>31</sup> The Board will remand the case to OWCP for referral of the record, together with a statement of accepted facts, to its DMA for review of the medical evidence on the issue of whether appellant has established additional impairment under the combined files, File No. xxxxxx877 and File No. xxxxxx738. On remand OWCP should also obtain a complete copy of its September 21, 2016 schedule award decision. It should also consider whether it should have resumed appellant's LWEC compensation after her schedule award compensation ended on June 1, 2018. After this and any further development deemed necessary, OWCP shall issue a *de novo* decision.

## CONCLUSION

The Board finds that this case is not in posture for decision.

---

<sup>29</sup> Federal (FECA) Procedure Manual, *id.*, at Chapter 2.808.6d.

<sup>30</sup> *G.W.*, Docket No. 19-0260 (issued July 10, 2020); *Cathy B. Millin*, 51 ECAB 331 (2000); *Douglas E. Billings*, 41 ECAB 880 (1990).

<sup>31</sup> *A.S.*, Docket No. 19-1432 (issued August 5, 2020); *A.A.*, 59 ECAB 726 (2008).

**ORDER**

**IT IS HEREBY ORDERED THAT** the July 10, 2019 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded to OWCP for further proceedings consistent with this decision of the Board.

Issued: September 18, 2020  
Washington, DC

Alec J. Koromilas, Chief Judge  
Employees' Compensation Appeals Board

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge  
Employees' Compensation Appeals Board